(3)

No. 84-1103

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM LLOYD HILL, PETITIONER

v.

A. L. LOCKHART, Director, Arkansas Department of Correction, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

JACK T. LASSITER
(Appointed by this Court)
HARTENSTEIN, LASSITER & OBERLAG
217 W. 2nd, Suite 315
P.O. Box 1228
Little Rock, AR 72203
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(Counsel for Petitioner)

ALICE ANN BURNS
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Justice Building
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(Counsel for Respondent)

PETITION FOR CERTIORARI FILED DECEMBER 17, 1984
CERTIORARI GRANTED MARCH 18, 1985

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

Case No. PB-C-81-217

WILLIAM LLOYD HILL, PETITIONER

v.

A. L. LOCKHART, ETC., RESPONDENT
and STEVE CLARK, THE ATTORNEY GENERAL OF THE STATE OF ARKANSAS, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Filed June 30, 1981

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1. Name and location of court which entered the judgment of conviction under attack—Pulaski County Circuit Court, 4th Division
2. Date of judgment of conviction—4-16-79
3. Length of sentence—35 years
4. Nature of offense involved (all counts)—Murder, 2nd degree & Theft of Property
5. What was your plea? (Check one)
   (a) Not guilty
   (b) Guilty ✔
   (c) Nolo contendere

* * * *

6. Kind of trial (Check one)

   (a) Jury

   (b) Judge only ✓

7. Did you testify at the trial?

   Yes No ✓

8. Did you appeal from the judgment of conviction?

   Yes No ✓

* * * *

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

    Yes ✓ No

11. If your answer to 10 was "yes", give the following information:

    (a) (1) Name of Court—Pulaski County Circuit Court, 4th Division

    (2) Nature of proceeding—(Rule 37) Motion for Modification (see attached)

    (3) Grounds raised—I) Within jurisdiction, II) incarcerated in Cummins and sentenced 4-6-79, III) serving 35 years under Act 93 (doing ½ before parole eligibility) IV) negotiated plea; 35 years for murder, 10 years for theft concurrent; ⅓ till parole eligibility, V) plea negotiation void by being put under Act 43, VI) double jeopardy.

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes No ✓

    (5) Result—Denied

    (6) Date of result—10-21-80

    (7) Case number—CR-78-1922

    (8) Citation, if reported—Ark. Stat. Ann. Sec. 43-2829

    (b) As to any second petition, application or motion give the same information:

    (1) Name of court—Pulaski County Circuit Court, 4th Division

    (2) Nature of proceeding—(Rule 26) Motion for Plea Withdraw (see attached)

    (3) Grounds raised—I) Within jurisdiction, II) Sentenced on 4-6-79 doing 35 years; incarcerated at Cummins, III. I understood the plea agreement was 35 years for murder & 10 years concurrent for theft & to do one-third (⅓) less good time until parole, V) Didn't know I could be held under Act 93 when plea agreement stated to do ⅓, IV) didn't receive sentence concessions, VII entitled relief under rule 26.1 C (iii) & (iv) & U.S.C.A. #14

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes No ✓

    (5) Result—Denied

    (6) Date of result—3-17-81

    (7) Case Number—CR-78-1922

    (8) Citation, if reported—

    (c) As to any third petition, application or motion, give the same information:

    (2) Name of court—Pulaski County Circuit Court, 4th Division

(2) Nature of proceeding—Notice of Appeal & Request for Appointment of Counsel (see attached)

(3) Grounds raised—Denied motion for plea withdraw; traversed and responded to State's Response & Motion for denial (A) (II) stipulation that the Supreme Court of Ark. did not make any *specific provisions* on this matter (B) (III) does *not* define a clause specifically denying relief & State vs. Scermando, 565 SW2d, 414, Haber vs. Shows, 538 SW2d 282 (doubt in favour of defendant)

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No ✓

(5) Result—Denied

(6) Date of result—4-27-81

(7) Case number—CR-78-1922

(8) Citation, if reported—

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes No ✓

(2) Second petition, etc. Yes No ✓

(3) Third petition, etc. Yes No ✓

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

1) did not have a defence against Court's statement the Act 93 couldn't be dealt with in post conviction relief & had no recourse to case cited by court, 2 & 3) Appeal denied

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Negotiated plea was not upheld

Supporting FACTS (tell your story *briefly* without citing cases or law): I agreed to plead guilty with the understanding that I'd get 35 yrs. for 1st degree murder & 10 years concurrent for theft of property, and that I would *only have 1/3 of my sentence to do, less good time.* This negotiation was voided, in that I am being forced to do ½, less good time, until parole eligibility.

B. Ground two: Entered into the guilty plea & plea negotiation without knowledge that sentence could be imposed the way it was.

Supporting FACTS (tell your story *briefly* without citing cases or law): My lawyer told me that a plea negotiation was binding to both

sides and that the Court would impose the sentence agreed to by me and the prosecutor. I did not know that the Court could deviate from the concessions agreed to without informing me, nor that it could say to do ⅓ minimum enstead of just ⅓, until parole.

C. Ground three: Ineffective Assistance of Counsel Supporting FACTS (tell your story *briefly* without citing cases or law): My lawyer did not inform me of Act 93's existence nor applicability to me, nor did he tell me that the Court could decide to impose a different manner of sentence than was agreed to. He also lied to me by saying that I'd only have to do 6 yrs. on my sentence if I stayed out of trouble.

D. Ground four: Not afforded due process on my motion for appeal (also all grounds raised in pertinent petitions, see attached)
Supporting FACTS (tell your story *briefly* without citing cases or law): I received a copy of the State's response to my notice of appeal on 4-28-81. I sent a traverse and reply on 5-1-81, but the Court made its decision on 4-27-81. (I was notified on 5-6-81 of this). The Court did not allow me time to traverse and reply, or the Prosecutor did not send me a copy of his response soon enough for me to have time to reply before Court date.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: C) Ineffective assistance of counsel—because I thought my other grounds were sufficient

and because I knew I couldn't really prove it. D) Due process—because it just occurred.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes No ✔

If "yes", what court?—

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing—

(b) At arraignment and plea—William Patterson, Public Defender

(c) At trial—William Patterson, Public Defender

(d) At sentencing—William Patterson, Public Defender

(e) On appeal—

(f) In any post-conviction proceeding—

(g) On appeal from any adverse ruling in a post-conviction proceeding

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ✔ No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes No ✔

• • • •

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Executed at Cummins Prison on May 8, 1981.

/s/ William L. Hill
Signature of Petitioner

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

ORDER

Filed June 30, 1981

Permission is granted to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. The Clerk will file and docket this petition without prepayment of fees and costs or security therefor.

The United States Marshal is directed to serve a copy of the petition on the respondent without prepayment of fees and costs or security therefor. The respondent is ordered to answer within twenty (20) days from the date of service.

DATED this 29th day of June, 1981.

/s/ Hoy L. Jones, Jr.
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

ANSWER AND REQUEST OF ORDER TO PRODUCE TRANSCRIPT

Comes respondent, through his attorneys, Steve Clark, Attorney General, and William C. Mann, III, Assistant Attorney General, and in answer to the petition for writ of habeas corpus states:

I.

That petitioner is presently incarcerated at the Cummins Unit of the Arkansas Department of Correction as a result of his conviction of murder in the first degree and theft of property on April 6, 1979.

II.

That petitioner has filed a motion under Rule 37 in the Pulaski County Circuit Court and that said motion was denied on October 21, 1980.

III.

That petitioner has not filed an appeal from the denial of relief under Rule 37, nor has he sought a belated appeal from such denial. *Finnie v. State*, 265 Ark. 19, 582 S.W.2d 19 (1979). (See Exhibit A)

IV.

That the grounds of this petition concern the petitioner's guilty plea and that respondent is not aware of any

transcript of the plea proceedings. That without a transcript the respondent lacks sufficient knowledge to respond to the petition.

WHEREFORE, respondent prays that this Court order that a transcript of the plea proceedings be provided at the expense of the United States Government, so that respondent may have sufficient information upon which to frame his response.

Respectfully submitted,

STEVE CLARK
Attorney General

By: /s/ William C. Mann III
WILLIAM C. MANN, III
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Attorneys for Respondent

Filed: July 24, 1981

[Certificate Omitted]

EXHIBIT A

TO WHOM IT MAY CONCERN:

I, Dona L. Williams, Clerk of the Arkansas Supreme Court, to the best of my knowledge, do hereby certify that William Lloyd Hill has not filed an appeal from the denial of relief under Rule 37 filed in Pulaski County Circuit Court, Fourth Division, nor sought a belated appeal from such denial, as of this date, July 23, 1981.

DONA L. WILLIAMS, Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Comes respondent, by and through his attorneys, Steve Clark, Attorney General, and William C. Mann, III, Assistant Attorney General, and for its response to the petition for writ of habeas corpus, states:

I.

That petitioner is presently incarcerated at the Cummins Unit of the Arkansas Department of Correction as a result of his plea of guilty to first degree murder and theft of property on April 6, 1979. That due to the effect of Act 93 of 1977 (Ark. Stat. Ann. § 2828, 2829), petitioner is required to serve one-half of his sentence, less good time, before parole eligibility. His parole eligibility date is February 1, 1988. (See Exhibit A)

II.

That petitioner has filed a motion pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure in the Pulaski County Circuit Court and said motion was denied on October 21, 1980. (See Exhibit B) Petitioner subsequently filed a motion to withdraw his plea pursuant to Rule 26.1 of the Arkansas Rules of Criminal Procedure. This motion was found to be untimely filed and without merit. (See Exhibits C and D) Petitioner evidently did

not appeal the denial of his Rule 37 motion to the Arkansas Supreme Court nor did he seek a belated appeal to that court. However, since more than eighteen months have passed since the denial of his Rule 37 motion, it appears that petitioner has exhausted his state remedies. See Rule 36.9, Arkansas Rules of Criminal Procedure.

III.

That petitioner was represented in this case by William Patterson, who is now deceased.

IV.

Respondent denies that petitioner's negotiated plea was not upheld and contends that petitioner was not mislead in anyway. (Petitioner's Grounds One and Two) As the transcript of the plea proceedings, filed previously with this Court, reflects, petitioner received the exact sentence he bargained for—thirty-five years for first degree murder and ten years for theft of property, the sentences to run concurrently.

Respondent has attached to this response a copy of the Plea Statement signed by petitioner and his attorney. (See Exhibit E) The statement reflects that petitioner was advised of the minimum and maximum sentences he could receive and that he had the right to a jury trial. Petitioner acknowledged that he was aware of these facts and also indicated that he was satisfied with the services of his attorney,

In the transcript of the plea proceedings, the prosecuting attorney and the trial judge set out the details of the negotiated plea agreement as follows:

> MR. HAYNES (DEPUTY PROSECUTING ATTORNEY): Your Honor, the State has agreed upon a plea of guilty to recommend that Mr. Hill receive a total sentence of 35 years in the Arkansas State Penitentiary.

THE COURT: Thirty-five years on Murder in the First Degree?

MR. HAYNES: Yes, sir, and then the other one will be ten years and that will be concurrent with it for a total of 35.

THE COURT: Are you William Lloyd Hill?

DEFENDANT HILL: Yes, sir.

THE COURT: And you want to plead guilty to this charge with this sentence in mind?

DEFENDANT HILL: Yes. sir.

The petitioner then proceeded to admit his guilt and relate the facts of the case to the trial judge. The judge then asked petitioner questions concerning the items listed on the Plea Statement and, after being satisfied that the plea was knowing and voluntary, ruled as follows:

> THE COURT: All right. I accept your plea of guilty. It is the judgment and sentence of this court that you be sentenced to the state penitentiary for a period of 35 years, murder in the first degree; a period of two years for theft of property. The sentences will run concurrently. It is agreed under the negotiated plea. . . .

The trial judge then stated that petitioner would be required to serve *at least* one-third of his sentence before becoming eligible for parole. Finally, at the conclusion of the plea proceedings, when asked if he had any questions about the plea or sentence or anything else about the case, petitioner replied that he did not.

Respondent contends that it is apparent from reading the transcript of the plea proceedings that the plea of guilty was in exchange for the total sentence of thirty-five years on the two charges. The amount of time served before becoming eligible for parole was not part of the plea bargain. The trial judge merely indicated that petitioner would be required to serve *at least* one-third of his sentence before becoming eligible for parole. This was certainly not a promise that petitioner would not have to serve longer than one-third and it cannot be considered a part of the negotiated plea between petitioner and the prosecuting attorney. Further evidence of this fact can be found in the order of the trial court denying petitioner's Rule 37 motion (See Exhibit B), wherein it was said:

> . . . with specific reference to petitioner's first statement about parole eligibility, the Court was merely setting a minimum parole eligibility time to serve when it said "(Y)ou will be required to serve at least one-third of your time before you are eligible for parole."

The actual amount of time required to be served before becoming eligible for parole is controlled by statute.

Respondent respectfully submits that the record of the plea proceedings, the plea statement and the order denying petitioner's Rule 37 motion provide an ample basis for determining that petitioner knowingly and voluntarily entered a plea of guilty. After doing so, petitioner cannot challenge the validity of his knowing and voluntary plea because he has doubts about the wisdom of that choice. *Thundershield v. Solem*, 565 F.2d 1018, 1025 (8th Cir. 1977).

V.

Respondent denies petitioner's allegation that he was denied effective assistance of counsel. Again, it should be noted that petitioner received the exact sentence he bargained for. Counsel certainly could not be deemed ineffective for advising petitioner to plead guilty in light of the facts of the case and in view of the much more severe sentence he could have received had he proceeded to trial and been convicted. Under the law in effect at the time of the commission of the offense, appellant could have received not less than five years nor more than fifty years

or life for the first degree murder charge and an additional consecutive sentence of ten years for the theft of property charge. Thus, it is evident that petitioner received a much lighter sentence in exchange for his guilty plea.

In *United States v. McMillian*, 606 F.2d 245, 247 (8th Cir. 1979), the Eighth Circuit reiterated the test used in this circuit to evaluate the effectiveness of counsel:

> In this circuit, the evaluation of a petition alleging ineffective assistance of counsel involves a two-step process. *Rinehart v. Brewer*, 561 F.2d 261 (8th Cir. 1977). The petitioner must first show that his attorney failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances. *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977). Second, the petitioner must demonstrate that he was materially prejudiced in the defense of his case by the actions or inactions of his counsel. *Nevels v. Parratt*, 596 F.2d 344 (8th Cir. 1979); *Morrow v. Parratt*, 574 F.2d 411 (8th Cir. 1978); *Rinehart v. Brewer, supra.*

The Eighth Circuit recently increased the petitioner's burden somewhat by holding that he must *at least* show dereliction of duty in order to prevail. *Zaehringer v. Brewer*, 635 F.2d 734 (8th Cir. 1980); *United States v. Rhodes*, 617 F.2d 1313 (8th Cir. 1980).

It is respectfully submitted that petitioner has not met the heavy burden of proof he bears by merely asserting that his attorney lied to him, especially in view of the clear evidence of the actual bargain petitioner agreed to. Therefore, this ground for relief is without merit.

VI.

Respondent denies that petitioner was denied due process of law. (Petitioner evidently refers to the trial court's denial of his Rule 26 motion). Petitioner does not set out

any violation of his rights under this ground, but merely states he was not given a chance to reply to the prosecutor's response to his motion. The attached orders of the Pulaski County Circuit Court indicate that all pleadings and records from the files on this case were considered by the court in its consideration of petitioner's Rule 26 motion. It was found to be untimely and without merit in that no manifest injustice occurred. Therefore, this ground does not demonstrate any violation of petitioner's rights.

VII.

Respondent denies each and every material allegation not specifically admitted herein.

WHEREFORE, respondent prays that this Court dismiss the petition and deny the relief sought without an evidentiary hearing pursuant to Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

Respectfully submitted,

STEVE CLARK
Attorney General

By: /s/ William C. Mann, III
WILLIAM C. MANN, III
Assistant Attorney General
Justice Building
Little Rock Arkansas 72201
(501) 371-2007

Attorneys for Respondent

Filed: June 8, 1982

[Certificate Omitted]

EXHIBIT "A"

AFFIDAVIT

I, Melba Smith, am presently employed at the Arkansas Department of Correction, Cummins Unit, in the capacity of Records Supervisor.

William Lloyd Hill, ADC# 73089, was sentenced on April 6, 1979 to serve a term of 35 years for Murder First Degree, which was committed on, or about October 1, 1978.

Due to a prior prison term on felony charges, he is under Act 93 of 1977, serving one-half (½) of his sentence, less Good Time, before parole eligibility.

As a Class I, he has a parole eligibility date of February 1, 1988.

/s/ Melba Smith
MELBA SMITH

EXHIBIT "B"

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No. CR-78-1922

WILLIAM L. HILL, PETITIONER

vs.

STATE OF ARKANSAS, RESPONDENT

ORDER

Petitioner, William L. Hill, filed a pro se petition, "Arkansas Code of Criminal Procedure, Rule 37" for "Modification of Sentence". The Court has considered the petition, the response thereto, the transcript of pleas taken, and the files and records of the case and finds conclusively that the petitioner, prisoner, is entitled to no relief. The Court makes the following findings of fact and conclusions of law, specifying those parts of the files or records that are relied upon.

1. Petitioner entered negotiated plans on the following charges on April 6, 1979, in the presence of his attorney, William Patterson: plea of guilty to a charge of first degree murder in Case No. CR-78-1922, and a plea of guilty to a charge of theft of property in Case No. CR-78-1922. These pleas were accepted by the Court and the petitioner was sentenced to 35 years in the State Penitentiary on the murder charge, and to ten (10) years in the State Penitentiary on the theft charge, to run concurrent to the murder sentence. The Court then stated, "(Y)ou will be required to serve at least one-third of your time before you are eligible for parole." See transcript of pleas.

2. Petitioner has alleged several grounds for relief in his Rule 37 petition as set out below.

> a. The judge assessed punishment and entered judgment . . . the defendant to do one-third (⅓) until parole eligibility.
>
> b. The plea negotiation is voided and my confinement is illegal since I'm required to serve one-half (½) instead of one-third (⅓) as I was sentenced because of Act 93.
>
> c. This places me in double jeopardy for the same offense violating my constitutional rights.

3. All of petitioner's allegations considered together regarding the application of Act 93 of 1977 (Ark. Stat. Ann. Sec. 43-2829) by the Arkansas Department of Correction to determine his parole eligibility date do not state a basis for relief within the scope of Rule 37.1 of the Arkansas Rules of Criminal Procedure. With specific reference to petitioner's first statement about parole eligibility, the Court was merely setting a minimum parole eligibility time to serve when it said "(Y)ou will be required to serve at least one-third (⅓) of your time before you are eligible for parole." Furthermore, petitioner's challenge to the manner in which his sentence is being executed is not properly considered in post-conviction relief proceedings. See *Higgins v. State*, 270 Ark. 19, —— SW2d —— (1980).

WHEREFORE, the Court hereby denies this petition for post-conviction relief and orders the Circuit Clerk of Pulaski County to immediately have a copy of this Order served upon the petitioner. If the petitioner seeks to appeal this Order, he must file a Notice of Appeal and Designation of Record with the Pulaski County Circuit Clerk within 30 days of the date of this Order.

/s/ [Illegible]
Circuit Judge

Filed: October 21, 1980

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

———

[Title Omitted]

———

ORDER

On this date this cause comes on for hearing on the pleadings and from the motion, the response thereto and from the files and records of the Court, the Court being well and sufficiently advised finds the defendant's motion is without merit and is hereby denied.

/s/ Harlan A. Weber
Circuit Judge

Filed: April 27, 1981

EXHIBIT "C"

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

[Title Omitted]

ORDER

On this day comes the Court to consider the defendant's Motion for plea withdrawal, filed pursuant to Rule 26, Arkansas Rules of Criminal Procedure and from all matters of fact and law before the Court, the Court doth hereby deny the Motion as not being timely filed and no manifest injustice has occurred.

/s/ Harlan A. Weber
Circuit Judge

Filed: March 17, 1981

EXHIBIT "D"

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

[Title Omitted]

JUDGEMENT

On the 17th day of March, 1981, this cause came on for hearing on the pleadings and from the pleadings and the files and records of the Court, the Court finds that defendant's Motion is without merit and is hereby denied.

This Order having been made on the 17th day of March, 1981, but not signed until now, is entered NUNC PRO TUNC.

/s/ Harlan A. Weber
Circuit Judge

Filed: April 29, 1981

[Certificate Omitted]

EXHIBIT "E"

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS

[Title Omitted]

PLEA STATEMENT

You are charged with 1st Degree Murder & Theft of Property in the Pulaski County Circuit Court. It is necessary that you fully understand the entire contents of this document.

Your are charged with a felony and with 0 prior convictions. You could receive a sentence of from 5-50 or Life in the state penitentiary and/or a fine of up to $15,000.00.

You have a right to plead not guilty and to be tried before the Court or a jury with the burden on the State of proving your guilt beyond a reasonable doubt. At the trial, you would have the right to testify or not testify, if you were found not guilty, you would be released on the charges for which you were tried. If, after determining the facts with instructions on the law from the court, the jury found you guilty, then they would fix your punishment. If you waive your right to trial by jury and elect a court trial, the court will determine both the facts and the law.

On the other hand, if you are guilty, you have a right to plead guilty to the Judge and the Judge would decide what your sentence should be.

With these thoughts in mind, you must answer each of the following questions and initial your response:

1. Do you understand the minimum and maximum possible sentences for the offense with which you have been charged?

Yes ✓ No Initials WLH

2. Do you understand that your plea of guilty is a waiver of your right to a trial by jury and of your right to appeal to the Ark. Supreme Court?

Yes ✓ No Initials WLH

3. Do you fully understand what you are charged with having done?

Yes ✓ No Initials WLH

4. Have you discussed your case fully with your attorney and are you satisfied with his services?

Yes ✓ No Initials WLH

5. Are you certain that your plea of guilty has not been induced by any force, threat, or promise apart from a plea agreement?

Yes ✓ No Initials WLH

6. Do you realize that the Judge is not required to carry out any understanding between you, your attorney, and the prosecuting attorney, and that the power of sentence is with the Court only?

Yes ✓ No Initials WLH

If your answer is "yes" to each of the preceeding questions, and if you fully understand every detail of your guilty pleas, then carefully read the following statement and sign in the appropriate space with your lawyer witnessing your signature.

I am aware of every thing in this document. I fully understand what my rights are, and I voluntarily plead guilty because I am guilty as charged.

Dated Apr. 6, 1979

/s/ William L. Hill
Defendant's Signature

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

Case #PB-C-81-217

WILLIAM LLOYD HILL, PETITIONER

vs.

A. L. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, RESPONDENT

TRAVERSE AND REPLY TO RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Comes now the petitioner, William Lloyd Hill, appearing *pro se* in this cause and for his traverse and reply to respondent's response, states:

I.

Petitioner is presently incarcerated at the Cummins Unit of the Arkansas Department of Correction and is within the jurisdiction of this Honorable Court. Respondent has so stipulated.

II.

Respondent denies that the negotiated plea was not upheld and that the petitioner was misled in any way Respondent contends that the on record conversation between the trial court and the prosecuting attorney establishes the parameters of the plea negotiations and that the time to be served until parole eligibility is not one of

the considerations alluded to therein. Respondent further contends that the fact that the petitioner voiced no protests and asked no questions when given an opportunity to do so proves that the petitioner had received the consessions contemplated by the negotiation. Respondent's denials and contentions are incorrect.

The petitioner has no direct knowledge of what transpired during the period of negotiation carried out between the petitioner's appointed counsel and the prosecuting attorney, however, the negotiated terms presented to the petitioner, by his appointed counsel, did, in fact, include the *clause—to do one-third (1/3) of the sentence, less good time*, prior to parole eligibility. However, if Mr. Patterson is now deceased, as respondent alleges in his response, petitioner has little hope of proving what Mr. Patterson told him the terms of the plea negotiation were. Nevertheless, the fact remains that petitioner believed himself to be pleading guilty in return for a total sentence of thirty-five (35) years and the possibility for parole after having discharged one-third (⅓) of the sentence, less good time allowances.

The petitioner voiced no protests and asked no questions because the trial court stated for the record that it was accepting the negotiated plea of guilty and sentencing petitioner to thirty-five (35) years for first degree murder, and ten (10) years for theft of property, the sentences to run concurrently, and the petitioner to serve at least one-third (⅓) of the sentence until parole eligibility. Since the trial court sentenced petitioner to all of the plea concessions, that the petitioner had been led to expect by Mr. Patterson, the petitioner saw no reason to protest or question anything. The petitioner, after having studied Ark. Stat. Ann. § 43-2828 thru § 43-2830 contends that the trial court's use of the words at least one-third of the sentence until parole eligibility prove that the trial court misrepresented the law in connection with the terms of the plea agreement, and thereby compounded petitioner's misapprehension of the proceedings.

Respondent contends that the amount of time to be served before parole eligibility was not part of the negotiated plea and that, even if it were, it wouldn't make any difference because the trial court merely mentioned a minimum amount of time and didn't promise that the petitioner would not have to serve longer than that. Respondent next contends that the amount of time to be served before parole eligibility could not have been a part of the plea negotiation because the actual amount of time to be served is controlled by statute.

Petitioner denies these contentions. Despite respondent's continual denial, said statement of the trial court appears in respondent's abstract of the record in his response. The trial court's interpretation and acceptance of the plea agreement vis-a-vis parole eligibility was also entered into the court docket. (Petitioner's Exhibit A, resubmitted by attachment hereto.) Petitioner properly relied upon the law as stated by the trial court and petitioner's appointed counsel. Petitioner, therefore, entered into the plea agreements, as stated by Mr. Patterson and the trial court, with the clear understanding that he could hope for release after serving six (6) years in the penitentiary if he diligently sought to rehabilitate himself. He has done so, (see part VI below). Respondent now contends that all of the petitioner's efforts and work toward this end were for nought. He now contends that the Prosecuting Attorney, Defense Attorney, and trial court all misled petitioner about the terms of the plea agreement and sentence because one of the terms was void under Ark. Stat. Ann. § 43-2829, in effect at the time of the agreement. Respondent contends that petitioner's hope, not for parole *per se*, but for a chance to be considered for release under the parole system must be dashed. Respondent contends, as a matter of law, that petitioner cannot hope for parole before serving seventeen and one-half years.

III.

(Petitioner respectfully renews his strenuous objection to being denied a copy of the transcript of record, or access even on a limited basis. Petitioner respectfully submits that it is impossible for him to argue on a transcription of record which he has never seen. Petitioner has some serrious concern in this area because of respondent's allegation that petitioner's appointed counsel is now deceased. If this is true, then petitioner has effectively been denied the right to correct any error that may be in the transcription of the proceedings because of the fact that petitioner couldn't properly ask for a transcript in the state court until he was granted a hearing. No hearing was ever granted.) Petitioner contends that the trial court, Prosecuting Attorney, and Defense Attorney knew, or should have known, about the effect of Ark. Stat. Ann. § 43-2828-thru-§ 43-2830, and should have apprised him of them. In not doing so they misled the petitioner, or allowed him to be misled, about the terms of the plea agreement and their viability under Arkansas law. Ark. Stat. Ann. § 43-2829 B. (2) & (3) states in pertinent part: "Inmates classified as first offenders under this Act [§§ 43-2828 - 43-2830], . . . shall not be elligible for release on parole until a *minimum* of one-third (1/3) of their sentences shall have been served .... Provided, however, that if the trier of fact determines that a deadly weapon *was used in the commission of a crime, first offenders . . . shall not be eligible for release on parole until a minimum of one-half (1/2) of the sentence shall have been served* . . . "(3) Inmates classified as second offenders under this Act . . . shall not be eligible for release on parole until a *minimum* of one-half (1/2) of their sentences shall have been served, with credit for good time allowances, ..." (emphasis added).

Petitioner respectfully submits that his not being apprised of the existence of Ark. Stat. Ann. § 43-2828-thru-§ 43-2830, nor of it's effect upon his sentence, pre-

cluded him from knowingly and voluntarily entering a guilty plea. Petitioner could not have made an informed decision to plead guilty while being ignorant of this essential information and, therefore, Thundershield v. Solem, 565 F.2d 1018, 1025 is no applicable case law. The facts of this case show that the petitioner's guilty plea was unfairly obtained and should be vacated as void, or have corrective measures applied whereby the sentence both conforms to Arkansas law and approximates the conditions petitioner originally was led to believe existed—eligibility for parole consideration after having served six (6) years. Kercheval v. United States, 274 U.S. 220, 224; 47 S.Ct. 582, 71 L.ed. 1009. (This case applies to unfairly obtained guilty pleas.)

IV.

Respondent denies that the petitioner was denied effective assistance of counsel and asserts that the petitioner has not met the burden of proving that his counsel was ineffective. Respondent then concludes that this ground for relief is without merit. Petitioner denies that his appointed counsel was effective. Petitioner contends that it takes more than just advising someone to cop a plea to make one's representation effective, especially if that plea is abrogated by existing law. The ultimate choice to accept the plea, or not to accept it, was the petitioner's. Not his appointed counsel's. Yet, by not informing the petitioner of all of the condition of law that could, or would, apply appointed counsel effectively stripped petitioner of all possibility of making a rational choice. Without such data, petitioner did not and could not rationally weigh the alternatives and make an informed decision to waive his right to a trial.

Even if petitioner's appointed counsel had not actively misled petitioner about the terms of the contract with the State, he passively misled petitioner by failing to correct the erroneous statements of the trial court. It

was the trial court's duty to state the law correctly and to insure that the petitioner's rights were not arbitrarilly violated. Yet, appointed counsel carried the greater weight of this responsibility, since he was charged with petitioner's defense. It was appointed counsel's duty to call the petitioners attention to any errors of law made by the trial court and to ensure that the contract could not be abrogated unilaterally by the state to petitioner's detriment on grounds of legal error. The ineffective representation provided by appointed counsel directly resulted in the dashing of petitioner's hopes of repaying society, and rebuilding his life afterwards, by serving six years and then becoming eligible for parole; which was an explicit part of the contract.

V.

Respondent contends that the parole consideration clause is merely valueless verbiage in the negotiated agreement. Respondent is wrong. Petitioner respectfully points out that under the law as stated by the trial court the minimum parole consideration date claimed by respondent permits hope for parole no sooner than if petitioner had gone to trial and been sentenced to a term of fifty-two and one-half ($52\frac{1}{2}$) years.

Respondent thus denies the intrinsic value of hope in contrast to actual attainment. Petitioner respectfully asks this Honorable Court to note that, not happiness but the persuit of happiness is one of the three rights considered self-evident and inallienable by our founding fathers. By asking this Court to void as worthless the parole consideration clause in the states contract with the petitioner, respondent asks this Court to judicially nullify the value of hope to the incarcerated individual. Yet, can any court put a price tag on hope, or appraise it's value? If hope has no value then it should never have been included in the terms of the contract. Petitioner respectfully submits that no one but petitioner can truthfully say what value the hope of early release for meri-

torious conduct holds for him, not how much that promise of hope influenced his decision to accept the agreement.

VI

As mentioned above petitioner has diligently persued the hope held out by the state. He has voluntered to participate in every rehabilitative program for which his security status and his circumstances make him eligible. Outstanding among these programs is the Cummins Unit Therapeutic Community in which petitioner has undergone intensive treatment to prevent any recurrence of anti-social behavior. In recognition of his personal rehabilitation the Department of Correction has raised petitioner to trustee status. He has received a certificate of appreciation from the Cummins chapter of the J.C.'s. He is currently serving as a volunteer lay-therapist in the Cummins Unit and has applied for a college correspondance course under the G.I. bill with the goal of attaining a degree as a therapist. Had petitioner not applied himself so directly to rehabilitation there might be some merit to respondent's argument that hope of early parole benefits neither the inmate or the state. That is not the case.

VII.

To unilatterally extend the time during which petitioner must be incarcerated without hope of parole, and to do so because petitioner was denied effective assistance of counsel and the protection of the trial court is denial of a fair hearing before an impartial tribunal as guaranteed by the sixth (6th) and fourteenth (14th) amendments of the United States Constitution. To do so by executive fiat of the Department of Correction without a hearing, access to counsel, or any procedural safeguards simply because petitioner is indigent and unable to afford counsel, except as provided by the state, is a denial of Due process of law and Equal protection under those same amendments. That petitioner's state remedies were ex-

hausted, in part, because the incarcerated petitioner was not provided with a copy of the state's response to his notice of appeal (of his rule 26's denial) and request for appointment of counsel until after the court had denied the petition was a further denial of equal protection and due process.

VIII.

Petitioner believes and therefore asserts that the plea (bargain) agreement can best be brought into conformance with the law of the state of Arkansas, while insuring justice is achieved, is to reduce the sentence to a term of years which is within the statutory range of penalties prescribed by Ark. Stat. Ann. § 41-901, for the charged crimes (Ark. Stat. Ann. § 41-1502, and § 21-2203) and which is consonant with the plea bargain negotiated by the state. Petitioner further believes that a term of twenty-three years (23) would fulfill these requirements of law.

Wherefore, the petitioner prays this Honorable Court to remand this cause to the Circuit Court of Pulaski County, Arkansas, with instructions to reduce petitioner's sentence to a term of twenty-three years or in the alternative to grant an evidentiary hearing and appoint able counsel to represent the petitioner; and for any and all other relief to which he may be rightfully entitled.

Date: 6-17-82

Respectfully submitted,

/s/ William L. Hill

PETITIONER'S EXHIBIT A

Case No. CR78-1922

CRIMINAL DOCKET

Date of Orders	ORDERS OF COURT
11-13-78	PLEA NOT GUILTY, JURY TRIAL Apr. 19, '78.
11-13-78	Affidavit of Indigency and in Support filed.
3-12-79	Pre-trial, (Neal)
3-13-79	Order filed directing Sheriff to take defendant for examination.
3-16-79	Motion to Suppress filed.
4- 6-79	Plea of not guilty withdrawn, plea of guilty entered. judgment 35 years. 1/3 parole, costs, negotiated plea.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

PETITIONER'S OBJECTIONS TO THE PROPOSED MEMORANDUM AND ORDER PREPARED BY THE UNITED STATES MAGISTRATE

The Petitioner, William Lloyd Hill, by his attorney, Jack T. Lassiter, in response to the proposed Memorandum and Order prepared by the United States Magistrate hereby designates the following objections to that proposed Memorandum and Order:

1. *The nature of the defendant's state court conviction.*

The Defendant/Petitioner William Lloyd Hill was charged with first degree murder and theft of property in the Pulaski County Circuit Court on November 3, 1978. On April 6, 1979, the defendant entered pleas of guilty and was sentenced to 35 years imprisonment for first degree murder and 10 years imprisonment for theft of property. The sentences were run concurrently. The docket sheet reflects that the sentencing judge ordered the defendant to serve "one-third parole". (Exhibit "A" to Petitioner's Traverse and Reply to Petition for Writ of Habeas Corpus) The petitioner had been previously convicted in Florida for assault and had served eight months in a Florida penitentiary. Therefore, the Petitioner was and continues to be treated as a second offender pursuant to the definition found at Ark. Stat. Ann. § 43-2828(2) and as such is not eligible for parole until having served one-half of his sentence with credit for

good time as required by Ark. Stat. Ann. § 43-2829(3). After an unsuccessful pro se attempt to withdraw his guilty plea, petitioner filed his Petition for Writ of Habeas Corpus. The Respondent State of Arkansas concedes that he has exhausted his state remedies. Based upon the pleadings presented to the magistrate and the transcript of the Petitioner's sentencing hearing, the magistrate prepared the Memorandum and Order suggesting dismissal.

2. *Contentions.*

The magistrate accurately summarized the Petitioner's arguments as three-fold. First, Petitioner argues that his guilty plea was involuntary in that the sentence imposed was in violation of a negotiated plea bargain; secondly, that in the alternative, counsel was ineffective in that he did not accurately advise the Defendant of his parole eligibility date; and third, that the Petitioner was denied due process during his appeal of the court's denial of his motion to withdraw his plea. Petitioner's first two arguments should be restated to allege that his guilty plea was involuntary in that his counsel improperly advised him as to his earliest possible parole eligibility date and as a result of that incorrect advice the Petitioner did not fully understand the consequences of his plea. Therefore, the petitioner asserts that his plea was not voluntarily entered and that he did not receive the effective assistance of counsel. It is Petitioner's contention that both of these allegations merit a hearing to determine whether Petitioner's plea was voluntary and whether he received effective assistance of counsel.

3. *Objections to the magistrate's memorandum and order.*

(a) Objections to the magistrate's proposed finding that the Petitioner's guilty plea was voluntarily entered and that his allegation that he was advised at the time that he would be parole eligible after serving one-third of his sentence less good time does not warrant relief.

As pointed out by the magistrate in page 4 of the proposed Memorandum and Order, to withstand a constitutional challenge a guilty plea must represent "a voluntary and intelligent choice among the alternative courses of action open to the Defendant", citing, *Thundershild vs. Solem*, 565 F.2d 1018 (8th Cir. 1977). The Defendant must understand the consequences of his plea. *Boykin vs. Alabama*, 395 U.S. 238 (1969). At the Petitioner's sentencing hearing the trial court did make inquiry into the voluntariness of the plea as appears in the proposed Memorandum and Order at pages 4 and 5. That inquiry is required by Ark. Rules Crim. Pro., Rule 24.5. The Arkansas Rules of Criminal Procedure do not require that the trial judge inquire as to the Defendant's understanding of potential parole eligibility dates. Several states however consider potential parole conditions to be an important factor at the time a defendant enters a plea and require the trial judge to inquire concerning the Defendant's understanding of parole conditions. The Arizona Rules of Criminal Procedure, Rule 7.2(b) requires a judicial inquiry into the Defendant's understanding of any "special conditions regarding sentence, paroles, or commutations imposed by statute." Illinois Supreme Court Rule 402 requires the trial judge at a guilty plea to advise the Defendant of any mandatory parole attached to a felony conviction.

The magistrate correctly states that the Eighth Circuit has not directly ruled as to whether a state court's failure to advise a Defendant of his parole eligibility date is such a consequence of a guilty plea that it would entitle the Defendant to habeas relief.

The Petitioner contends that his counsel's erroneous advice concerning his potential parole eligibility date was a critical factor in his decision to enter a guilty plea. It was an important consequence of his plea which he

did not understand. As a result of the erroneous information supplied to him by counsel, the plea was not intelligently made. Therefore, this matter should be set for a hearing for a factual determination as to whether or not the Defendant intelligently entered into the negotiated plea in light of the erroneous advice of counsel.

Several jurisdictions have addressed this particular problem. In *People vs. Owsley*, 66 Ill.App.3rd 234, 22 Ill. Dec. 795, 383 N.E.2nd 271 (1978), the Illinois Appellate Court reviewed the order of a circuit court judge summarily dismissing without a hearing the Defendant's petition for post-conviction relief. The Defendant's petition alleged that her trial attorney during plea negotiations had misrepresented the minimum time that she could become parole eligible, eligible for weekend furloughs and work release and thus her guilty plea was rendered involuntary and unknowing. The appellate court held that it was error to summarily dismiss the Defendant's petition for post-conviction relief, where the allegations therein concerning ineffective assistance of counsel were not palpably incredible. That court held that the trial court should determine whether the allegations in the petition when viewed against the record of the guilty plea are so palpably incredible, patently frivolous or false as to warrant summary dismissal, citing *Blackledge vs. Allison*, 431 U.S. 63 (1977). Petitioner's similar allegations in this habeas proceeding are not patently frivolous and do not justify summary dismissal.

In *State of Arizona vs. Holbert*, 114 Ariz. 244, 560 P.2nd 428 (1977) and *Washington vs. Harvey*, 5 Wash. App. 719, 491 P.2nd 660, the trial court's erroneous statement concerning potential parole eligibility dates later resulted in guilty pleas being set aside as involuntary. In *Holbert, supra*, the Defendant pled guilty to second degree armed burglary and armed robbery and was sentenced to concurrent terms of not less than 40 nor more than 60 years on both counts. The Defendant's use of a gun during the commission of the offense rendered him

ineligible for parole until serving the minimum term. None of the attorneys present nor the sentencing judge properly explained the consequences of the statute to the Defendant. The court, while inquiring of the Defendant's understanding of the plea, stated that the Defendant was not eligible for parole until the expiration of five calendar years which was a misstatement of his parole eligibility. Neither the defense attorney nor the prosecutor corrected the judge. The Arizona court found that the plea was, therefore, not knowingly and intelligently made and that the Defendant did not understand the true consequences of his plea.

In *Harvey, supra*, the court erroneously advised the Defendant that the Board of Prison Terms and Paroles could determine what minimum sentence might be set where the consecutive terms imposed by the court created a mandatory minimum term. The court's erroneous advice rendered the plea defective.

Similarly, a prosecuting attorney's advice to a defendant that the parole board could set a minimum term of imprisonment when the law had been amended to deprive the board of that authority was found to be grounds for habeas relief by setting aside the guilty plea as involuntary. *Allen vs. Cranor*, 45 Wash.2nd 25, 272 P.2nd 153 (1954).

The Illinois Supreme Court has held that the trial court's failure to admonish a Defendant concerning a mandatory period of parole when accepting his guilty plea is a factor to be considered in determining the voluntariness of the plea. *People vs. Wills*, 61 Ill.2nd 105, 330 N.E. 2nd 505, *see also, People vs. Blackburn*, 46 Ill.App. 2nd 213, 360 N.E.2nd 1159 (1977).

California has taken a similar position. In *People vs. Tabucchi*, 64 Cal.App. 3rd 133, 134 Cal.Reptr. 245 (1976), the California Court of Appeals held that the failure to advise a Defendant of the statutorily required three year minimum term for parole eligibility rendered the Defendant's guilty plea involuntary. The Defendant had been sentenced to a minimum term of 5 years and mis-

takenly believed that he would be parole eligible after serving one-third of the five year term. However, the Defendant was not eligible for parole under California law until he had served three years of the minimum five year term. The court stated—

> "Recognizing the critical importance to a defendant of the right to parole and recognizing the widespread knowledge of persons charged with crime concerning the 'one-third minimum time' parole policy of the adult authority in usual cases, we believe that notice to a defendant of any statutorily required minimum term for parole eligibility contrary to and of greater duration than the usual adult authority policy based on Penal Code, § 304, is constitutionally required as a pre-requisite to entry of a guilty plea under the rationale of *In Re Tahl, supra.* Such a minimum term for parole eligibility must be deemed a direct rather than a collateral consequence of the guilty plea." (Citations omitted at 251)

It should be pointed out that one court has held that where the Defendant's guilty plea is motivated by his own subjective uncoerced beliefs about future parole eligibility, the plea may not be withdrawn, assuming that it was otherwise knowing and voluntary. *Birts vs. State*, 68 Wis.2nd 389, 228 N.W.2nd 351 (1975). That, of course, is distinguished from the instant case in that the Defendant William Hill was advised by counsel that he would not be eligible for parole until having served one-third of his sentence less good time, specifically, Mr. Hill contends that his attorney advised him that he would be parole eligible in approximately 6 years.

The United States Court of Appeals for the Seventh Circuit set aside a Defendant's guilty plea where he was advised by the court at sentencing that he would get out as quickly as he could if he would be a model prisoner. The Seventh Circuit found that the trial court's advice at sentencing suggested parole eligibility when under the

statute controlling the Defendant's sentence the Defendant was parole ineligible. *Gates vs. United States*, 515 Fed. 2nd 73 (7th Cir. 1975).

In summation, the Petitioner contends that the magistrate erred in denying the Petitioner's request for relief without the necessity of a hearing. Based on the analysis in the aforementioned cases, the Defendant's understanding through advice of counsel as to this potential parole eligibility date raise a fact question as to the voluntariness of his plea. The petitioner contends that the potential parole eligibility date constitutes an important factor in determining the voluntariness of his plea. The issue of voluntariness involves an evaluation of the psychological factors and elements that may be reasonably calculated to influence the human mind. That issue, the Defendant's state of mind at the time he entered the plea, should be decided by the trier of fact. *Blackburn vs. Alabama*, 361 U.S. 199 (1960). The Petitioner should be entitled to a hearing on this matter and a factual determination. The importance of the potential parole eligibility date as a vital consequence of the guilty plea is born out by the affidavits of experienced criminal defense attorneys attached hereto as Exhibit "A" to these objections.

(b) Petitioner's contention that he was denied the effective assistance of counsel by counsel's failure to advise him correctly as to his parole eligibility date.

The magistrate correctly sets forth the test in the Eighth Circuit by citing *Hawkman vs. Parratt*, 661 F.2nd 1161, 1165 (8th Cir. 1981) which stands for the position that the Petitioner in order to prevail on an ineffective assistance of counsel theory must establish that: (1) his attorney failed to exercise the customary skill and diligence that a reasonable and competent attorney would have performed under the same sort of circumstances;

and (2) that his lawyer's ineffectiveness prejudiced him. The advice of counsel must be within the range of competence demanded of attorneys in criminal cases. *Supra*, at 1170 and n.18. The magistrate suggests in the Memorandum and Order that ". . . the fact that petitioner's attorney may have advised him incorrectly as to his parole eligibility date does not render counsel's performance constitutionally inadequate." The magistrate concludes based on the cases cited in his proposed Memorandum and Order that "aspects of traditional parole eligibility need not be communicated to a Defendant. It follows then that even if an attorney's advice concerning such eligibility is not totally accurate, such advice does not render that attorney's performance constitutionally inadequate."

The Petitioner contends that based on the authority cited above that Petitioner's misunderstanding as to his potential parole eligibility date may form the basis of setting aside a guilty plea. The cases in subsection (a) above stand for the proposition that the Defendant's potential parole eligibility date may be an important consequence of his plea. The attorneys' affidavits attached hereto confirm the importance that defendants in criminal cases place on their minimum parole eligibility date. Here, the Petitioner contends that his attorney advised him incorrectly as to the amount of time he would have to serve before becoming parole eligible. Therefore, the Petitioner contends that a viable issue exists as to whether his attorney acted within the range of confidence demanded of attorneys in criminal cases. The Petitioner should be entitled to a hearing with the opportunity to present proof through expert witnesses that incorrect advice as to parole eligibility by defense counsel is not within the range of competence demanded of attorneys in criminal cases.

It is Petitioner's contention that he would not have entered into the negotiated plea had his attorney correctly advised him that he would be required to serve one-

half of his sentence less good time under Arkansas law. Therefore, the Petitioner was prejudiced thereby satisfying the second prong of the test set forth in *Hawkman vs. Parratt, supra.*

(c) Objection to the magistrate's finding that the Defendant's contention that he was denied due process by the trial court's failure to grant his motion to withdraw plea is frivolous.

For the reasons stated in subparagraphs (a) and (b) above, the trial court should have granted the relief requested by petitioner. Petitioner's contention in his habeas petition have now been more artfully stated than they appeared in his motion before the Pulaski County Circuit Court. However, the Petitioner asserts that the trial court should have set the matter for a hearing based on Petitioner's allegations and granted the relief requested for the reasons set forth in the preceding sections of this brief.

WHEREFORE, the Petitioner for the reasons set forth above requests that the United States District Court order that this matter be set for an evidentiary hearing and that the relief requested in the Petition for Writ of Habeas Corpus be granted and all other legal relief to which the Petitioner is entitled.

Respectfully submitted,

/s/ Jack T. Lassiter
JACK T. LASSITER
Attorney for Petitioner
Little Rock, Arkansas 72203

Filed January 11, 1983

[Certificate Omitted]

EXHIBIT "A"

AFFIDAVIT

STATE OF ARKANSAS)
COUNTY OF PULASKI)

TO WHOM THIS MAY CONCERN:

I, Sandra Trawick Berry, on oath do hereby state>

That my experience in the criminal law filed is based on three years of practice as a deputy public defender for the Sixth Judicial District of the State of Arkansas and one year of private practice, during which time one hundred percent of my practice has been devoted to criminal defense. Dissolution of a great majority of the cases on which I served as defense counsel involved plea negotiations and guilty pleas for penitentiary time. It has been my experience that, in such negotiations, the foremost factors with which the defendant is concerned are his parole eligibility date and considerations which might have an effect on that date. Generally, a defendant's decision to accept or reject a negotiated plea turns on the percentage of time he is required by law to serve.

January 11, 1983

/s/ Sandra Trawick Berry
SANDRA TRAWICK BERRY

AFFIDAVIT

STATE OF ARKANSAS)
COUNTY OF PULASKI)

TO WHOM IT MAY CONCERN:

I, Ray Hartenstein, on oath do hereby state:

That my background in criminal law encompasses one year as a law clerk for the Honorable J. Frank Holt of the Arkansas Supreme Court, two years as an assistant attorney general in the Criminal Justice Division of the State Attorney General's Office, a year and a half as Chief Deputy of the Arkansas Appellate Public Defenders Office, and approximately two years in the private practice of law. During this time I have represented numerous criminal defendants and have entered into plea negotiations in many of the cases. Perhaps the most critical factor in the plea negotiations I have been involved with is the actual parole eligibility date. It has been my practice to determine what factors, if any, exist which might have a bearing on my client's eligibility date and to then inform my client as precisely as possible of his earliest possible parole date under the sentence being negotiated. If there are factors which affect the parole eligibility date, I inform my client what they are and how they will affect the sentence he is to receive. It is my opinion that this is a fundamental duty owed by counsel to his client and necessary to fully apprise the client of the consequences of the plea that is being negotiated. I presently and have in the past represented clients in collateral proceedings who were not informed of their parole eligibility date at the time they entered their pleas, and who would not have entered the plea they did had they been so informed. Due to the dramatic effect Act 93 can have on a sentence, I think it is extremely important that the client be made aware of any effect that Act, or similar acts, may have upon the sentence being negotiated.

January 11, 1983

/s/ Ray Hartenstein
RAY HARTENSTEIN

AFFIDAVIT

STATE OF ARKANSAS)
) ss.
COUNTY OF PULASKI)

TO WHOM IT MAY CONCERN:

I, Richard N. Moore, Jr., on oath do hereby state:

That my background in criminal law encompasses three years as deputy prosecuting attorney for the Sixth Judicial District of the State of Arkansas and five and one-half years of private practice, during which time I have represented many criminal defendants as a defense lawyer. During this period of time I have had occasion to enter into plea negotiations on numerous cases and it has been my experience during these negotiations that an important consideration by the defendant is the issue of parole eligibility and the actual date that the defendant might be eligible for parole consideration. This particular issue appears to be as important to many of the defendants as any of the issues being negotiated.

January 10, 1983

/s/ Richard N. Moore, Jr.
RICHARD N. MOORE, JR.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

STATEMENT OF NECESSITY

The Petitioner, William Hill, by his attorney, Jack T. Lassiter, hereby submits the following grounds in support of a request for an evidentiary hearing in this matter:

1. An evidentiary hearing is necessary in this matter because factual issues exist which should be resolved by the trier of fact. The Petitioner herein has filed his objections to the proposed Memorandum and Order prepared by the United States Magistrate which sets forth the legal reasons why a hearing is necessary in order to determine whether the Petitioner's guilty plea at his state court conviction was voluntarily entered.

2. A hearing is necessary to resolve the issue of the voluntariness of the Defendant's plea. The Defendant desires to testify as to his understanding of the plea agreement, the advice given to him by his counsel and his state of mind at the time of entering the plea. Further, the Petitioner intends to use several witnesses who are attorneys in the Little Rock area experienced in the practice of criminal law who will testify as to the importance a criminal defendants place on potential parole eligibility dates when negotiating pleas.

WHEREFORE, the Petitioner requests that the Court grant an evidentiary hearing in order to resolve the factual issues raised in the Petitioner's Petition for Writ of Habeas Corpus and briefed in the Petitioner's

Objections to the Proposed Memorandum and Order Prepared by the United States Magistrate.

Filed: January 24, 1983

Respectfully submitted,

/s/ Jack T. Lassiter
JACK T. LASSITER
Attorney for Petitioner
P.O. Box 1228
Little Rock, Arkansas 72203
(501) 376-1817

[Certificate Omitted]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

ORDER

The Court has received a Memorandum and Order from Magistrate Henry L. Jones, Jr. After careful review of his findings, the Court adopts them in their entirety.

IT IS, THEREFORE, ORDERED that the petitioner's petition be dismissed.

IT IS SO ORDERED this 28th day of February, 1983.

/s/ Garnett Thomas Eisele
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

ORDER

Pending before the Court is the petitioner's statement of necessity in support of his request for an evidentiary hearing in this matter. The Court has reviewed the request and petition and finds that petitioner's request must be denied.

The issue in this case is a legal one concerning the voluntariness of a defendant's plea made in conjunction with a plea bargain where he thought that he would be eligible for parole after serving one-third of his sentence, when in fact he was not eligible until he had served one-half of his sentence. The Court has already assumed that the petitioner believed that he had to serve one-third of his term, and has also assumed that his counsel might not have made him aware of the "one-half" rule. Yet as a matter of law, the Court has concluded that the petitioner was not deprived of the benefit of his plea bargain in spite of the lack of clarity with respect to his time to be served before being eligible for parole.

It is therefore Ordered that the petitioner's request for an evidentiary hearing on this matter be, and it is hereby, denied.

Dated this 28th day of February, 1983.

/s/ Garnett Thomas Eisele
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

JUDGMENT

Judgment is hereby entered pursuant to the Order filed in this matter this date. The petition is dismissed and the relief prayed for is denied.

DATED this 28th day of February, 1983.

/s/ Garnett Thomas Eisele
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

NOTICE OF APPEAL

Notice is hereby given that William Hill, the Petitioner in the above styled case appeals to the United States Court of Appeals for the Eighth Circuit from the Order of the United States District Court for the Eastern District of Arkansas entered on the 28th day of February, 1983, refusing the relief requested by his Petitioner for Writ of Habeas Corpus.

Filed March 16, 1983

Respectfully submitted,

/s/ Jack T. Lassiter
JACK T. LASSITER
Attorney for Petitioner
Little Rock, Arkansas 72203

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

[Title Omitted]

CERTIFICATE OF PROBABLE CAUSE TO AUTHORIZE APPEAL

I, Honorable G. Thomas Eisele, District Judge in the above entitled cause, in which the Petition for Writ of Habeas Corpus was denied, do hereby certify pursuant to 28 U.S.C. § 2253 (1964), that there exists probable cause for appeal. It is therefore ordered that leave to appeal is granted.

WITNESS my hand and seal as such judge, this 17th day of March, 1983.

/s/ Garnett Thomas Eisele
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1397-EA

WILLIAM LLOYD HILL, APPELLANT

vs.

A. L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION, APPELLEE

Appeal from the United States District Court
Eastern District of Arkansas
Pine Bluff Division
The Honorable G. Thomas Eisele, District Judge

PETITION FOR REHEARING EN BANC

The Petitioner, William Lloyd Hill, by his attorney Jack T. Lassiter requests pursuant to F.R.App.Pro. Rules 35(a), (b) and 40 and Rules of the United States Court of Appeals for the Eighth Circuit, Rule 16, that this Court review the opinion of the three judge panel filed on April 9, 1984, by review en banc.

I, Jack T. Lassiter, attorney for Petitioner, based on a reasoned and studied professional judgment, state that this appeal raises the following question of exceptional importance: Where a state court prisoner alleges in a habeas petition that his guilty plea was entered based upon positive misinformation supplied by his trial attor-

ney concerning his potential parole eligibility date, did the District Court err in dismissing the petition finding as a matter of law that it did not raise allegations sufficient to grant habeas relief? The argument rests either on the voluntariness of the prisoner's plea or the denial of his Sixth Amendment right to effective assistance of counsel. The prisoner/appellant alleged in his habeas petition that his attorney had advised him that he would be eligible for parole after one third of his thirty five year sentence less good time. However, the appropriate Arkansas parole eligibility act rendered the petitioner/appellant ineligible for parole until service of one half of his sentence less good time.

/s/ Jack T. Lassiter
JACK T. LASSITER
Attorney for William Hill

The Petitioner William Lloyd Hill asserts that this Petition for Rehearing meets the rigid standards of Rule 35(a) in that this decision involves a case of first impression in the Eighth Circuit and involves a question of exceptional importance.

LOWER COURT ACTION AND SUMMARY OF THREE JUDGE PANEL DECISION

The Petitioner William Lloyd Hill filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Arkansas, Western Division, on June 30, 1981. The petition attacked the voluntariness of a guilty plea entered in the Pulaski County Circuit Court on April 6, 1979. This plea was a negotiated plea. Mr. Hill had been charged with first degree murder and theft of property on November 3, 1978, in the Pulaski County Circuit Court. As a result of the negotiated plea Mr. Hill was sentenced to thirty-five years imprisonment for first degree murder with a ten year term running concurrently on a conviction for theft of property. At page six of Mr. Hill's Petition for Writ of Habeas Corpus, Mr. Hill alleged that he entered the guilty plea with the understanding that he would have one-third of his sentence to serve less good time. Mr. Hill alleged that his court appointed attorney informed him that he would only have six years to serve on his sentence if he "stayed out of trouble". Mr. Hill alleged in his petition that his attorney failed to inform him of the impact of Ark. Stat. Ann. § 43-2828(2), and §43-2829(3) known as "Act 93". Under that act, Mr. Hill was rendered ineligible for parole consideration until having served one-half of his term less good time. Mr. Hill had one previous felony conviction, and, therefore, he was ineligible for parole under "Act 93" until having served one-half of his term less good time. The United States District Court Judge G. Thomas Eisele, agreeing with the proposed memorandum of the magistrate, dismissed the petition, stating that as a matter of law it did not warrant relief. (T. 54-67).

Mr. Hill appealed to the Eighth Circuit alleging that the District Court erred in entering an Order denying the Petitioner's request for an evidentiary hearing on his Petition for Writ of Habeas Corpus and finding as a matter of law that Petitioner's contentions concerning the voluntariness of his plea and the incorrect advice of his attorney cannot warrant habeas relief. This case was submitted on September 15, 1983, to the United States Court of Appeals for the Eighth Circuit and the opinion affirming the United States District Court for the Eastern District of Arkansas was filed on April 9, 1984, with the Honorable Floyd R. Gibson, Senior Circuit Judge, and the Honorable John R. Gibson, Circuit Judge, voting with the majority opinion, and the Honorable Circuit Judge Gerald W. Heaney dissenting.

The majority opinion held that the parole eligibility date was not part of the plea bargain and that the state bargained simply that Hill would serve no longer term than that to which the judge sentenced him. (majority opinion at 5 and 6) The Court also held that the details of parole eligibility are considered a collateral rather than a direct consequence of a plea for which a Defendant need not be informed before pleading guilty. (majority opinion at 4) The majority opinion addressed *Strader v. Garrison*, 611 F.2d 61 (4th Cir. 1979) and attempted to distinguish it arguing that the alleged misadvice of counsel here did not constitute the same "gross misinformation" as occurred in *Strader*. In addressing the argument of Petitioner that his counsel's misadvice constituted ineffective assistance of counsel, the majority opinion stated that even if the allegations concerning counsel's misadvice were correct, that those allegations did not amount to constitutionally inadequate performance and did not constitute a dereliction of duty sufficient by itself to allow the Petitioner to withdraw his guilty plea.

In dissent Circuit Judge Heaney agreed with the Fourth Circuit cases of *Strader v. Garrison, supra,* and

O'Tuel v. Osborne, 706 F.2d 498, 500 (4th Cir. 1983), which stand for the position that an attorney who wrongfully informs a client contemplating a plea bargain that the client will spend less time incarcerated than the published law mandates has acted incompetently. The dissenting opinion reviews *Strader* pointing out that there the Defendant's lawyer assured his client that by pleading guilty and accepting a thirty-year sentence to run concurrently with a prior sentence, the Defendant would not extend his prior parole eligibility date. However, state law was different. His potential parole eligibility date was extended by several years as a result of the additional concurrent sentence. The dissenting opinion reviews *O'Tuel v. Osborne*, *supra*, finding that it stands for the position that an attorney acts ineffectively when he fails to discover the applicable statute for parole eligibility had been amended, and consequently informs his client that he would be eligible for parole after ten years when he was actually ineligible for parole until serving twenty years. The dissenting opinion also distinquishes *United States v. Degand*, 614 F.2d 176 (8th Cir. 1980) relied upon by the majority in that the advice given by Degand's attorney to Degand concerning concurrent sentencing gave the Petitioner there only a "hope of leniency" rather than constituting a misreading of the law. The dissenting opinion goes on to point out that nothing at Hill's plea hearing would have alerted him to his attorney's error and that the trial court reinforced the attorney's error by stating that Hill would have to serve at least one-third of his sentence.

The dissenting opinion also differs with the majority over the interpretation of the "gross misconduct" standard referred to in *Strader*. The dissent finds that the magnitude of the alleged oversight in this case was no less than in *Strader*, *supra*, and *O'Tuel*, *supra*. The dissent states that this case does not rest on a requirement that the state court inform Hill of his parole eligibility date. The dissent points out that the collateral consequence rule should not bar an ineffective assistance of counsel claim where an attorney's misadvice respecting a collateral consequence induces a Defendant to plead guilty.

ARGUMENT IN SUPPORT OF PETITION

To withstand a constitutional challenge a guilty plea must represent a voluntary and intelligent choice among the alternate courses of actions open to a Defendant. *Rouse v. Foster*, 672 F.2d 649, 651 (8th Cir. 1982). The Defendant must understand the consequences of his plea. *Boykin v. Alabama*, 395 U.S. 238 (1969). A plea cannot be truly voluntary unless the Defendant possesses an understanding of the law in relation to the facts. *Johnston v. Zerbst*, 304 U.S. 458, 466 (1938). However, it has been held that the details of parole eligibility are a collateral consequence of a plea. *Hunter v. Fogg*, 616 F.2d 55 (2d Cir. 1980) and *Trujillo v. United States*, 377 F.2d 266 (5th Cir.)

In this case the Petitioner need not take issue with the collateral/direct consequence distinction raised by the majority opinion. Mr. Hill squarely places before the Eighth Circuit for the first time the question of whether a plea can be rendered involuntary as a result of ineffective assistance of counsel where counsel misadvises the petitioner as to the time the petitioner must serve before he may become parole eligible. In the instant case, the Petitioner alleged that his attorney advised him that he would potentially be parole eligible after serving one-third of his sentence less good time or six years. The applicable state law rendered him ineligible for parole until serving one-half of his sentence less good time or nine years. The Petitioner requests a rehearing en banc in that this decision is one of special importance since it is of first impression before the Eighth Circuit and of extraordinary importance in that this decision could result in the summary dismissal of any habeas petition resting on allega-

tions of misadvice of counsel concerning potential parole eligibility dates.

Although the Petitioner agrees that no one can predict the actual time that any prisoner will serve, the critical importance of the earliest potential parole eligibility date when negotiating a guilty plea cannot be ignored. Attach to the objections of the Petitioner to the proposed memorandum and order of the magistrate were affidavits of three attorneys actively engaged in criminal defense work (T. 68-83). Those affidavits stand for the proposition that the potential parole eligibility date constitutes one of the foremost factors in the accused's decision of whether or not to accept a plea offer. To refuse to recognize the potential parole eligibility date as an important factor during plea negotiations is to ignore the most critical consideration in most negotiations. The Petitioner believes that the majority opinion is in error stating that a mistake amounting to a three year difference in a potential parole eligibility date does not constitute "gross misconduct" on the part of the attorney for petitioner under the majority's interpretation of the *Strader* test.

Other courts have recognized the importance of the potential parole eligibility date in the plea bargaining process. In *People v. Owsley*, 66 Ill. App. 3d 234, 383 N.E.2d 271 (1978), the Illinois Appellate Court reviewed the order of a lower court judge summarily dismissing without a hearing (as was the case here) a petition for post-conviction relief alleging that the defendant's trial attorney during plea negotiations misrepresented among other things the time she would serve before becoming parole eligible. The appellate court held that is was error to summarily dismiss the petition. Erroneous statements by the trial court concerning potential parole eligibility dates have resulted in guilty pleas being set aside by appellate courts as involuntary. See, *Arizona v. Holbert*, 114 Ariz. 244, 560 P.2d 428 (1977) and *Washington v. Harvey*, 5 Wash. App. 719, 491 P.2d 660 (1971). A prosecuting attorney's erroneous advice to a defendant

concerning potential parole eligibility has been held to render a plea involuntary. *Allen v. Cranor*, 45 Wash. 2d 25, 275 P.2d 153 (1954) and *see also, Baker v. Finkbeiner*, 551 F.2d 180 (7th Cir. 1977). Although neither F.R.Crim.Pro. Rule 11(c)(1) nor Ark.Rules.Crim.Pro. require that the Court explain parole eligibility information to a defendant, not all courts have agreed with that approach. *See People v. Tabucchi*, 64 Cal. App. 3d 133, 134 Cal. Rptr. 245 (1976), and *People v. Wills*, 61 Ill.2d 105, 330 N.E.2d 505 (1975).

The dissenting opinion's explanation of the distinction between *United States v. Degand*, 614 F.2d 176 (8th Cir. 1980) and this case is of particular importance. Here the petitioner alleged in his habeas petition that he had received positive misinformation from his attorney. The allegations in the petition do not express communications which only provided "hopes". The allegations stated that his attorney directly misadvised him as to his potential parole eligibility date.

In holding that petitioner's allegations could not constitute grounds for habeas relief, the majority opinion fails to recognize one of the most critical functions that an attorney can perform during the plea negotiation process. It is no doubt that the majority opinion will result in some increased judicial economy for the courts, but that consideration should not prevail over Petitioner's Sixth Amendment right to effective assistance of counsel.

Respectfully submitted,

/s/ Jack Lassiter
JACK T. LASSITER

Filed, April 19, 1984

[Certificate Omitted]

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No. CR-78-1922

STATE OF ARKANSAS

vs.

WILLIAM LLOYD HILL

PLEA OF GUILTY

BE IT REMEMBERED, that on the 6th day of April, 1979 the same being a day of the regular March 1979 Term of the Pulaski Circuit Court, Fourth Division, this cause came on to be heard, the State being represented by the Honorable Lloyd Haynes, Deputy Prosecuting Attorney, and the defendant being represented by the Honorable William Patterson, thereupon, the following proceeding were had and done, as follows:

MR. PATTERSON:
Your Honor, this is Case CR-78-1922.

THE COURT: William Lloyd Hill. The charge is Murder in the First Degree, Count 1. Count 2 alleges Theft of Property. Is this a negotiated plea?

MR. PATTERSON: Yes, your Honor.

THE COURT: And, what is the negotiated plea for?

MR. HAYNES: Your Honor, the State has agreed upon a plea of guilty to recommend that Mr. Hill receive a total sentence of 35 years in the Arkansas State Penitentiary.

THE COURT: Thirty-five years on Murder in the First Degree?

MR. HAYNES: Yes, sir, and then the other one will be ten years and that will be concurrent with it for a total of 35.

THE COURT: Are you William Lloyd Hill?

DEFENDANT HILL: Yes, sir.

THE COURT: And you want to plead guilty to this charge with this sentence in mind?

DEFENDANT HILL: Yes, sir.

THE COURT: Are you guilty?

DEFENDANT HILL: Yes, sir.

THE COURT: This Information alleges on October the 1st, 1978, that you did unlawfully, feloniously, with the premeditated and deliberated purpose of causing the death of Darrel Pitts, did cause the death of Darrel Pitts by shooting the said Darrel Pitts with a .38 caliber pistol. Did you do that?

DEFENDANT HILL: Yes, sir.

THE COURT: It further alleges that you committed a theft of property on an unmentioned date.

MR. HAYNES: Same date, your Honor.

THE COURT: The same date. Is that the way you understood it?

MR. PATTERSON: Yes, sir.

THE COURT: In Pulaski County. It states that for the purpose of depriving the owner of his property, take unauthorized control over property having a value in excess of $100.00, such being the property of Darrel Pitts. Did you do that?

DEFENDANT HILL: Yes, sir.

THE COURT: And, was that on October the 1st, 1978, also?

DEFENDANT HILL: Yes, sir.

THE COURT: All right. Is this your signature on the bottom of this plea statement?

DEFENDANT HILL: Yes, sir.

THE COURT: Has your attorney explained this statement to you?

DEFENDANT HILL: Yes, sir.

THE COURT: Do you understand it?
DEFENDANT HILL: Yes, sir.
THE COURT: Do you have any questions about it?
DEFENDANT HILL: No, sir.
THE COURT: Any threats or promises made to get you to enter the plea of guilty?
DEFENDANT HILL: No, sir.
THE COURT: Other than the negotiated plea?
DEFENDANT HILL: No, sir.
THE COURT: Tell me shortly just in your own words what happened in this case? Where were you, first, the location?
DEFENDANT HILL: In Little Rock. We started out at a bar, the Gas Light, and he, Darrel Pitts, did something that I didn't like and it ended up in my shooting him and I stole his car. That is basically the run down of the facts.
THE COURT: These things that he did that you didn't like, was it necessary that you shoot him?
DEFENDANT HILL: I felt like it was.
THE COURT: Well, in what respect?
DEFENDANT HILL: Well, he hit me in the teeth with a gun. He also stabbed another person the same night and I just felt threatened by him. I am not saying I should have killed him but that was my way of solving the problem.
THE COURT: Where did you get the pistol?
DEFENDANT HILL: It was his pistol, a 36. Derringer.
THE COURT: Did you take it away from him?
DEFENDANT HILL: No. After he hit me in the teeth with it, when he got in the car he threw it at me and later on, after we took the other guy to the hospital, on the way back that is when I used it and shot him.
THE COURT: Did he have a pistol?
DEFENDANT HILL: No, your Honor. He had a knife.
THE COURT: Was he threatening you with a knife?
DEFENDANT HILL: He didn't have it pointed at

me but he had it where it could have been used as a weapon against me.
THE COURT: Was he driving the car at the time you shot him?
DEFENDANT HILL: No. I was driving the car.
THE COURT: You were driving the car? Whose car was it?
DEFENDANT HILL: His car.
THE COURT: What did you do with him after you shot him?
DEFENDANT HILL: Put him in the Arkansas Traveler Motel. It was our room. We were working on a construction crew and being kept at that motel and then I took off and fled the state with his car and his gun.
THE COURT: How did you get him into the room?
DEFENDANT HILL: I carried him in, kinda drug him in.
THE COURT: Well, all things considered, of course, you understand that you are entitled to trial by jury on this case and have them determine your guilt or innocence, as well as fix the punishment in this case. Do you understand that?
DEFENDANT HILL: Yes, sir. I understand that.
THE COURT: You are entitled to call witnesses in your own behalf and cross examine witnesses called by the state. Are you aware of that?
DEFENDANT HILL: Yes, sir; I am.
THE COURT: All things considered, it is your decision after advising with your attorney to enter a plea of guilty on the negotiated plea for 35 years for murder and 10 years for theft of property?
DEFENDANT: Yes, sir; it is.
THE COURT: All right. I accept your plea of guilty. It is the judgment and sentence of this court that you be sentenced to the state penitentiary for a period of 35 years, murder in the first degree; a period of two years for theft of property. The sentences will run concurrently. It is agreed under the negotiated plea. You will

be required to serve at least one third of your time before you are eligible for parole. Be assessed the costs of this action. This is on a negotiated plea and recommendation of the state.

MR. PATTERSON: Your Honor, may we get credit for jail time?

THE COURT: How long have you been in jail on this charge?

DEFENDANT HILL: Four months.

MR. PATTERSON: Just about four months, Your Honor.

THE COURT: The defendant is allowed credit for four months served. Do you have any questions about the plea or sentence or anything having to do with this case?

DEFENDANT HILL: No, sir.

THE COURT: That is all.

MR. PATTERSON: Thank you, your Honor. May we be excused?

THE COURT: Yes.

(THEREUPON, the Plea of Guilty of William Lloyd Hill was concluded.)

Filed: October 21, 1980

[Certificate Omitted]

SUPREME COURT OF THE UNITED STATES

No. 84-1108

WILLIAM LLOYD HILL, PETITIONER

v.

A. L. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION

ORDER ALLOWING CERTIORARI

Filed March 18, 1985

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Eighth Circuit* is granted.

Justice Powell took no part in the consideration or decision of this petition.

SUPREME COURT OF THE UNITED STATES

No. 84-1103

WILLIAM LLOYD HILL, PETITIONER

v.

A. L. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION

ON CONSIDERATION of the motions of petitioner for leave to proceed further herein *in forma pauperis* and for appointment of counsel,

IT IS ORDERED by this Court that the said motions be, and the same are hereby, granted, and that Jack T. Lassiter, Esquire, of Little Rock, Arkansas, is appointed to serve as counsel for the petitioner in this case.

April 29, 1985